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THE RELATION OF THE FEDERAL GOVERNMENT TO INDUSTRIAL COMBINATIONS

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BEFORE

THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE

By

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The Relation of the Federal Government to Industrial Combinations.

In his separate report to the House of Representatives as a member of the committee which investigated the United States Steel Corporation, Mr. Littleton of New York stated that the record of the investigation by that committee "teaches * * * that the American Government is confronted in the handling of its corporate problems with the most difficult economic and industrial problem of its history." And he pointed out that the first question arising in connection with that problem was, "What is to be the attitude of the Government toward business—business in its corporate form, business in cooperative corporate form?"[1]

This question, apparently, was no nearer its solution a month ago than it was in August, 1912, when the reports of the committee on the Steel Corporation were submitted.

But the message read to the Congress by President Wilson on January 20 of this year has, in more or less concrete form, recommended legislation to accomplish stated results; some bills have been introduced to carry out certain of those recommendations, others are publicly stated to be in course of preparation, and committees of both houses of Congress have been engaged in hearing the views and opinions of various individuals who have appeared before them with respect to those bills, and to other measures yet to be formulated to carry out the President's recommendations. Discussions of the question in the abstract therefore must give way to a consideration of the specific recommendations of the President and of the measures introduced in Congress to carry out those recommendations.

The magnitude of the interests involved scarcely can be exaggerated.

The report of the Commissioner of Internal Revenue for the year ending June 30, 1913, shows that returns under the Federal special excise tax law (applicable substantially to all stock corporations and insurance companies engaged in business in the United States) were made in that year by 305,336 corporations, having an aggregate capital of nearly $62,000,000,000, and bonded and other debt of nearly $35,000,000,000, and receiving an aggregate net income for the year of upward of $3,800,000,000.

Not all of these corporations engage in interstate or foreign commerce; but, without undertaking accurately to state to what extent they so do, it may safely be asserted that a very large percentage of them would fall within the scope of the power to Congress to regulate commerce among the several States and with foreign countries.

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[1] Pp. 232–3.

In introducing to Congress the subject of the regulation of these vast interests, President Wilson stated that public opinion "seems to be clearing about us with singular rapidity"; that—

> in respect of the monopolies which have multiplied about us and in regard to the various means by which they have been organized and maintained, it seems to be coming to a clear and all but universal agreement in anticipation of our action.

The President did not indicate what were the sources of his information as to this all but universal agreement of public opinion. The opinions of those persons who since then have appeared before the committees of Congress have not expressed any such accord, and the newspaper discussions of his recommendations and of the bills exhibit an increasingly strong difference of opinion as to the wisdom, necessity, or expediency of much of the recommended legislation, and especially as to the appropriateness of the bills thus far formulated to carry out such recommendations, and as to the effect of the legislation proposed by them.

The President recommends the enactment of laws—

1. To prevent "interlocking" directorates of corporations.
2. To regulate the financing of railroad companies.
3. To further define the meaning of the words "restraint of trade" and monopoly, as used in the Sherman Act.
4. To create an Interstate Trade Commission, with the function of "smelling around" for violations of the antitrust laws and to aid in the dissolution of unlawful combinations.
5. Imposing more severe penalties upon individuals connected with violations of the Sherman Law.
6. Prohibiting holding companies.
7. Declaring that in a suit for damages by an individual against a combination which has been adjudged unlawful in a suit by the Government the defendant shall be estopped by that judgment from relitigating the question of its unlawful character.

These recommendations are submitted with the further suggestion that the owner of stocks in two or more competitive corporations may be compelled to elect in which one he will vote and be prohibited from voting in another.

"Constructive legislation when successful," the President truly says, "is always the embodiment of convincing experience and of the mature public opinion which finally springs out of that experience."

What, then, is that "convincing experience," and that "mature public opinion" springing out of it, which the national legislature should translate into statutory form, so as to assure to the business men of America, in the future, ways of liberty, peace, and success?

The President says:

> We are all agreed that "private monopoly is indefensible and intolerable," and our program is founded upon that conviction.

The adjective "private," as here used, may be taken, I presume, to distinguish from "public" monopoly, and it may be remarked in passing, that public monopolies in the past have occasioned greater evils, and have given rise to far greater oppression of the people than any "private monopolies." This is obvious, for no complete monopoly can exist except by governmental action. The effort to attain monopoly by acts of private individuals, even when aided by Government, through grant of corporate powers and privileges, has never

completely extinguished competition. But when the President in his message refers to "private monopoly," undoubtedly he means the various large combinations of actual or potentially competing corporations popularly known as "trusts."

Combinations such as these in the past have produced the same injurious effects upon the public interests, in the suppression of competition and the control of prices, as were occasioned by governmental monopolies in England and other countries, and the power acquired by the misuse of the wealth and influence of such combinations, and especially by their unfair preferences in rates and facilities of railroad transportation of their product, led first to the enactment of the interstate-commerce acts affecting common carriers, and then to the Sherman antitrust law of 1890, which declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce"; and makes liable to fine and imprisonment "every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations."

The debates in Congress over this law show, as Chief Justice White pointed out in the Standard Oil case—

> that the main cause which led to the legislation was the thought that it was required by the economic conditions of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility of combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.[1]

The statute passed to meet these conditions received authoritative construction in its application to industrial combinations, by the Supreme Court, in the Standard Oil and Tobacco cases. Its terms were so comprehensive that some courts had given them a literal application which actually turned the act into a means of destroying that very freedom of contract it was meant to protect. But the Supreme Court construed the statute [2] in a spirit of reasonableness to mean—

(1) That it "did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish that purpose."[3]

And that it did include and condemn "every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed." The court declared that in view of the general language of the statute, and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form." [4]

By these decisions the court itself said in a later case:

> the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy "by resort to any disguise or subterfuge of form" or the escape of its prohibitions" by any indirection." [5]

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[1] 221 U. S., 50.
[2] U. S. *v.* Am. Tob. Co., 221 U. S., 106.
[3] 221 U. S., 179.
[4] 221 U. S., 181.
[5] Standard Sanitary Mfg. Co. *v.* U. S., 226 U. S., 20, 49

This law, as thus construed, is therefore entirely adequate to reach any "private monopoly" which may exist and affect interstate commerce, without resort to further legislative aid.

By the application of its provisions every one of the great combinations which are popularly known as "trusts" has been dissolved at the suit of the Government, or is now a defendant resisting the suit of the Government to compel its dissolution.

I challenge anyone to point to-day to a single organization outside of the defendants in pending Government suits that may properly be called a private monopoly. Moreover, the tendency to concentrate control over industry has been absolutely arrested. Not one monopolistic "trust" has been formed in the United States since the decision of the Supreme Court in the Standard Oil and the Tobacco cases.

No matter by what means—whether in themselves innocent or legal, or venal and unlawful—if the end attained by a combination is to put an undue restraint upon interstate commerce, or to demonstrate an effort to monopolize any part of it, the Sherman antitrust law has been proved adequate to reach and envelop it with the cloak of illegality; to look through form to substance; to compel dissolution, disintegration, reconveyance; to enjoin acts; to punish by fine and imprisonment. Certainly no legislation is needed to strengthen the prohibitions of the statute so construed. In many quarters, as the scope and effect of the statute have become recognized, a demand has arisen that it should be modified so as specifically to permit certain prohibited practices, such as fixing the resale price of particular classes of goods. But the President has recommended no such modifications of its scope. He seeks rather to accentuate its provisions and to define their application.

Despite the enactment of the Sherman law in 1890; in large measure because of the unfortunate construction put upon it in the Knight case in 1896—a decision which was generally construed to mean that all of the manufacturing plants in the United States which produced a given commodity might be absorbed into one ownership, and the Federal law be powerless to reach it—a large number of combinations of corporations were formed, so that at the time when the Standard Oil and Tobacco cases were decided in almost every branch of industry there had grown up some combination which was dominant—in some cases absolutely controlling.

The peculiarity of the composition of our Federal Union, and the conflicting legislation of State and Nation readily facilitated this process. Save in the cases of the transcontinental railway lines, the National Government has never granted charters of incorporation to carry on commerce among the States or with foreign nations. Every State has had its own system of creating and regulating corporations, and the Supreme Court at an early day held that every State might decide for itself on what terms it would admit corporations of another State to do business within its borders. The burdens imposed by some States as a condition to admitting corporations of another State speedily led to the incorporation in those States of domestic corporations to carry on there the business of the foreign parent company which owned and held its stock. These, and many other complexities and conflicts of State laws, led of necessity to intercorporate stock holding, the abuse of which furnished the simplest and the most

availed-of method of securing control in a few hands over vast fields of industry.

"We are agreed, I take it," says President Wilson, "that the holding corporations should be prohibited." Yes; if Congress furnishes some other effective agency for cooperative industry. But first, what does the President mean by "holding corporations" whose extinction he thus proposes? If he means corporations which are only holding companies, and nothing else—that is, corporations whose sole business is to hold and vote upon stocks of a number of competitive corporations, and to control the conduct of those corporations by reason of such ownership—few will differ with him. But, if he means to destroy the right of one corporation engaged in interstate commerce to hold stock in another corporation so engaged without regard to whether or not such holding amounts to stifling competition and monopolizing industry—that is, without regard to the surrounding circumstances or the intent and purpose of such holding—then I think very few business men or other persons familiar with business and economic conditions in the United States will agree with him. In this respect, as in other of the President's recommendations and in the pending legislation, there is a failure to discriminate between the normal processes of necessary business cooperation and the abuse of those processes to attain unfair and unlawful results. Every agreement between two individual competitors to combine their interests and form a partnership operates to terminate and restrain the competition previously existing between them. To legislate without discrimination against every agreement which directly or indirectly may restrict competition is to put an embargo upon all healthy normal business development.

Constructive legislation also should discriminate between the past and the future. Owing to the original misinterpretation of the Sherman law above referred to, and to governmental laxity for several years in its enforcement, large combinations of monopolistic tendency arose, which now are being or must be dealt with to conform them with the requirements of law.

As to those existing combinations, the processes of the federal equity courts and the responsibility of the Attorney General should be supplemented by some properly constituted administrative body to which the problem of readjustment may be submitted, by the courts, by the Attorney General, or by the parties, with the power and the duty in that commission to so disintegrate or redajust the combination as to create lawful normal competitive conditions. But this commission should not be left to exercise an uncontrolled discretion respecting such dissolutions. Congress should declare the principles by which it should be guided. It should be required to accomplish the result with as little injury as possible to the interests of the general public and with a proper regard for the interests of private property which may have become vested in individuals.

Congress should make it clear that mere size—the amount of capital or assets, or volume of business—should not be the criterion as to the extent or character of disintegration. The business of this great country can not be divided up into small retail units. Relative amount, proportioned to the extent of the business, of course, is important. No corporation should be left with so large a proportion

of the business involved as to give it a control great enough to exclude sound effective competition. The Supreme Court in the Tobacco case declared that it decided the combination to be illegal, "not because of the vast amount of property aggregated by the combination," and, "not alone because of the dominion and control over the tobacco trade" which was found to exist, but because of the illegal methods by which that size was reached and that control maintained.

In like manner, with respect to every combination, a line should be drawn between those in which the illegality is merely technical, resulting from the union of actually or potentially competing units, followed by normal methods of sound business development without efforts to destroy competitors and control prices; and those combinations shown to have been formed with monopolistic intent to suppress previously existing competition, with the purpose of asserting control over a field of industry, and whose history is characterized by acts of unfair conduct toward competitors and the abuse of the power secured through combination.

Discrimination should also be made between the form and extent of the control left for purposes of domestic trade, and those for foreign commerce. We can control all corporations engaged in commerce at home. When our citizens go abroad to conduct commerce in or with foreign countries they come in contact with competitors whose organization and methods we can not control. We should not hamper our own citizens by preventing them from so organizing as to be able effectively to meet such foreign competition.

The determination of the commission as to the legality of organizations resulting from its action should be final and conclusive in favor of the defendants, as well as of the Government, subject only to a right in any party concerned within a limited period to appeal to a circuit court of appeals on questions of law only.

Organizations which have passed the examination and conformed to the requirements of such a commission should be able to start business with the conclusive presumption of legality from the standpoint of the national law. Such a provision of law more than any other would, I believe, meet the unanimous approval of the business world and remove the vague unrest which will pervade it until the pending legislative program is settled.

With respect to the future, a different and distinct policy, I believe, is required.

The Sherman law needs no amendment to stregthen its provisions, and a watchful enforcement of that law by the law officers of the Government will be amply sufficient to prevent any recurrence of the conditions which grew up prior to the decisions in the Standard Oil and Tobacco cases.

The recommendation to further define by law the meaning of restraint of trade and monopoly is based upon an entire misconception of the law. The act as now construed forbids all contracts, etc., which unduly restrain insterstate commerce. The acts by which such restraint is brought about are as manifold as the ingenuity of man.

The President says:

> Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what actual experience has disclosed.

Theses practices being now abundantly disclosed can be explicitly item by item forbidden by statute in such terms as will pratically eliminate uncertainty, the law itself and the penalty being made equally plain.

Presumably to accomplish the purposes thus indicated, two bills have been introduced and are now pending before Congress, attempting to define attempts to monopolize trade or commerce, and the words "contract," "combination," or "agreement in restraint of trade," as employed in the antitrust law.

These bills do not even attempt to codify the decisions rendered by the Supreme Court in construing the antitrust law. Nor do they tend to make certain any uncertainties found to exist in the present law. They introduce new phaseology which would call for new and uncertain judicial construction. They follow in their general structure statutes which have been enacted in some of the States.

One of these bills provides that it shall be deemed an attempt to monopolize interstate commerce for any person to discriminate in price between different purchasers of commodities in the same or different sections or communities with the purpose or intent to injure or destroy a competitor; provided that nothing contained in the act shall prevent discrimination in price between purchasers of commodities on account of difference in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for the difference in cost of transportation.

What "due allowance" would be could only be determined at the end of a lawsuit.

It is further provided that nothing in the act shall prevent persons from selecting their own customers, except that a mine owner may not refuse "arbitrarily" to sell to a "responsible person, etc.," who desires to purchase—again an invitation to a law suit, because "arbitrariness" is a conclusion to be drawn by a court or jury from all the facts and circumstances.

Another section of this act provides that it shall be deemed an attempt to monopolize for any person making a sale to fix a charge or a discount from or rebate on the price, on condition that the purchaser shall not deal in the goods, wares, or merchandise of the competitor. That would prevent a purchaser from employing a sole agent to whom he should sell his product outright, while not invalidating the employment of a sole agent to sell on commission—a vexatious and wholly unnecessary distinction.

Another bill—the definitions bill—declares that the terms "contract," "combination," "conspiracy," and "monopolize," as used in the Sherman law, shall be taken to include any agreement or combination for the following purposes:

(1) To create or carry out restrictions in trade or to acquire a monopoly in any interstate trade, business, or commerce.

(2) To limit or reduce the production or increase the price of merchandise or of any commodity.

(3) To prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or any commodity.

(4) To make any agreement, enter into any arrangement, or arrive at any underatanding by which they, directly or indirectly, undertake to prevent a free and unrestricted competition among themselves or

among any purchasers or consumers in the sale, production, or transportation of any product, article, or commodity.

The form of the bill leaves it in doubt whether the agreement is to be illegal if made for any one or only for all of these purposes.

President Wilson, in his message to Congress, truly says:

> Constructive legislation when successful is always the embodiment of convincing experience and of the mature public opinion which finally springs out of that experience.

Does this bill embody such convincing experience? One source to which we may properly turn for an answer to this question is furnished by the legislation of the different States. In 15 or more of the States [1] a law has been passed containing provisions very similar to this bill. Most of these laws have been enacted since 1906. In almost all of this legislation it has been recognized that general provisions of the character contained in the Government's bills without qualification would be unenforceable, because to enforce them would destroy not merely competition, but trade and commerce itself; and the legislatures in at least 10 States, to prevent that clearly foreseen result, have ingrafted upon these prohibitions provisos and exceptions which either wholly neutralize the effect of the prohibitions or so restrict their operation as to limit them to substantially those cases which in the national domain would fall within the purview of the Sherman antitrust law as construed by the Supreme Court because constituting undue restraint of trade or commerce or an attempt to monopolize some part of it.

Thus, in 1906, the Legislature of Kentucky passed a law for the express purpose of making it unlawful for the growers of wheat, tobacco, corn, oats, hay, or other farm products to enter into pools for the purpose of more advantageously holding and marketing their crops, and to select an agent or agents through or by whom they may carry out their cooperative selling.

In 1907 the Legislature of California passed an antitrust act almost in the terms of the bill pending in Congress which, amended in 1909, provides—

> that no agreement, combination, or association shall be deemed to be unlawful or within the provisions of this act the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed.

And further—

> that it shall not be deemed to be unlawful, or within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize, or own any interest in any association, firm, or corporation having as its object or purpose the transportation, marketing, or delivery of such commodities.

And by section added in 1909 it was declared to be lawful—

> to enter into agreements or form associations or combinations the purpose and effect of which shall be to promote, encourage, or increase competition in any trade or industry, or which are in furtherance of trade.

Similar exceptions were added to the law passed in Colorado in 1913 in very much the same language as in the California law referred to.

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[1] New Jersey, 1913; North Carolina, 1907; California, 1907–1913; Colorado, 1913; South Dakota, 1909; Indiana, 1907; Michigan, 1899; Missouri, 1913; Mississippi, 1908; Montana, 1913; North Dakota, 1907–1913; Nebraska, 1913; Oklahoma, 1913; Wisconsin, 1913; Wyoming, 1911.

In Indiana, in 1906, a proviso was inserted in the antitrust act—

that it shall be a good defense to any action growing out of any violation of the provisions of this act or any other act or common law relating to the subject matter of this act if the defendant shall plead and by a fair preponderance of the evidence prove that such violation is not in restraint of trade or commerce or does not restrict trade or commerce or limit or reduce the production or increase or reduce the price of merchandise or any commodity natural or artificial or prevent competition in manufacturing.

In Wyoming a law passed in 1911 prohibits the selling in one part of the State at a lower price than in another part, after equalizing prices with respect to the distance from point of production, but provides that the act shall not apply—

to any case where by reason of different railroad rates or other natural things in favor of any manufacturer or dealer of goods of this or another State such manufacturer or dealer sells at a different price than he does in another, in order to meet the competitive rates or other natural things in favor of such other manufacturer or dealer:

Provided further, That this act shall not apply to any case where any manufacturer of or dealer in goods manufactured or produced in this State sells products in one place cheaper than in another to meet upon the same or more favorable basis any competition from foreign States or this State:

Provided further, That this act shall not prevent the sale of goods at proper commercial discount customary in the sale of such particular goods.

In 1913 antitrust laws were enacted in each of the States of North Carolina, Oklahoma, South Dakota, and Colorado. In every one of these acts is some proviso or exception taking out of the drastic general provisions of the law some particular form of commercial cooperative activity. For example, in Oklahoma it was provided that nothing contained in the act should prevent a combination of two or more corporations or any member thereof—

from meeting any price made by anyone not connected in any way with, or influenced by, any member thereof, at any point within this State, without being required to make such price generally, so long as such outside party maintains such price in good faith, but no longer, if such point be within the immediate territory of a financially weaker competitor.

In South Dakota the proviso was that any person, etc., buying a commodity in more than one section, community, or locality of a State—

may raise prices in any given section, community, locality, or city to, but not above, the prices paid by other persons, firms, or corporations buying such commodities, in such section, community, locality, or city when necessary to meet actual legitimate competition in such section, community, locality, or city without being held to have violated the provisions of this act.

In North Carolina contracts, combinations, or conspiracies in restraint of trade were declared illegal—

unless the persons entering into such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce can show affirmatively upon an indictment or civil action for violation of sections 1 and 2 of this act that such contract, combination in the form of trust, conspiracy in restraint of trade or commerce does not injure the business of any competitor, or prevent anyone from becoming a competitor because his or its business will be unfairly injured by reason of such contract, combination in the form of trust, or conspiracy of trade or commerce.

Here, therefore, is exhibited in the legislation of these 9 States—Kentucky, California, Illinois, Indiana, Wyoming, North Carolina, Oklahoma, South Dakota, and Colorado—a recognition, expressed in legislative enactment, of the fact that general drastic provisions of law assuming to prohibit absolutely every form of agreement which may

directly or indirectly restrict competition, is not in the public interest, accomplishes more harm than good, and results in hampering and not in liberating trade and commerce.

Congress itself has recently given expression to a recognition of the same fact, although more narrowly expressed, in adding to the appropriation contained in the sundry civil bill of last year, for the enforcement of the antitrust laws, a provision that moneys so appropriated shall not be spent in the prosecution of—

(*a*) Any organization or individual for entering into any combination or agreement having in view the increasing of wages, shortening of hours, or bettering the condition of labor, or for any act done in furtherance thereof, not in itself unlawful.

(*b*) Producers of farm products and associations of farmers who cooperate and organize in an effort to and for the purpose to obtain and maintain a fair and reasonable price for their products.

If, therefore, as President Wilson says, the legislation now to be enacted is to give expression to the best business judgment of America, must it not conform to a judgment which has found expression in the legislation of so many States, rather than to the academic idea that trade and commerce can be liberated, and business freedom and prosperity secured by putting upon the statute books of the Nation provisions of law which the experience of a dozen or more States of the Union has shown are unenforceable and contrary to the public interest, and by repealing a construction put by the courts upon the national law, which has made it an effective instrument to reach the evils which produced its enactment, without unduly interfering with the legitimate business of the country?

The same lack of discrimination between cause and effect is shown in other recommendations. Control of competitive corporations through community of directorships has been one method of reaching after monopoly; but to provide crudely, as the bill pending before Congress does, that no person engaged in the business of manufacturing or selling railroad cars, locomotives, rails or structural steel, shall be a director in any railroad or public service corporation engaged in interstate commerce, without the slightest regard to the locality of the enterprises or the relations between the two corporations, and that no director of a bank shall be a director in a railroad company, is on a par with burning a house down in order to rid it of rats.

The law might well prohibit any dealing between a bank and a railroad company having directors in common, and forbid a railroad company to buy supplies from a corporation a substantial number of whose directors were also directors in the railroad company. This would be measurably, to apply the law to the evil. But the right of all individuals to the control of their own property should not be forbidden because some property owners abuse such rights. To provide, as one of these bills does, that the fact that two or more corporations engaged in whole or in part in interstate or foreign commerce have one common director shall be conclusive evidence that no real competition exists between them is an absurdity so gross that it is impossible to conceive of it finding enactment into law.

The President's recommendation as to controlling the financing of railroad corporations is worthy of careful consideration. In the first place it should be provided that no corporation shall hereafter acquire an interest in any other interstate railroad, except upon a

finding of the Interstate Commerce Commission that such acquisition would not unduly restrain interstate commerce or unduly extend the natural monopoly which every railroad necessarily enjoys.

With such a provision railroad companies then safely could and should be exempt from the provisions of the Sherman antitrust law.

The control of the Interstate Commerce Commission over rates and practices of railroads is now so comprehensive that with the extension of its powers over the acquisition of one company, or an interest therein, by another, the reason for subjecting interstate carriers to the antitrust law would cease, and with it any fear of the uneconomic process of splitting up substantial railroad systems into small units, threatening much greater expense of operation and serious public inconvenience, such as seems to be impending with respect to the New England railroad situation to-day.

With respect to the control of financing, the problem is complicated by the fact that until Congress affords the interstate railroads a means of incorporating under national law it can only deal restrictively with the issue of stocks and bonds by State corporations. It can say what they shall not do, not what they may do.

The same embarrassment in legislating only negatively and restrictively applies with even greater force in the dealings of the National Government with State industrial corporations. All of the proposed legislation adds restrictions, imposes conditions upon them, and tells them what they shall not do. The problem of the relation of the Federal Government to cooperative industrial business can never be satisfactorily solved until Congress courageously legislates in the affirmative, declares what can be done, and throws the protection of the National Government about those who conform to its laws in acting under it.

That the problem will never be solved until Congress shall provide for incorporation under Federal law of companies engaging in business on a large scale was the conclusion reached by two of the members of the Stanley committee which investigated the Steel Corporation—Messrs. Gardner and Danforth. Business on a large scale can only be conducted by corporations. A corporation is nothing but a group of men, cooperating to carry on some business under provisions which limit their liability for the debts of the concern to their agreed contribution to its capital, and in which they can sell or transfer their interests, in whole or in part, without affecting the organization. The conflicting laws of the States are in large measure responsible for the problems which have vexed the public. They can only be solved by affirmative action. Negative action is cowardly, and must in the future prove to be as unsatisfactory as it always has done in the past.

The theory that the business of more than 300,000 State corporations can be carried on by running to Washington for permission from an executive commission to perform the ordinary acts which business activities require should need only to be stated to afford its own refutation.

As an affirmative policy for the future, Congress should provide for the organization of corporations to carry on interstate commerce, under broad powers, which will secure honesty of organization, fair publicity of those facts which the public have a right to know con-

cerning the organization and business, require all corporations carrying on business of $5,000,000 or upward to take out a Federal charter within two or three years, make it optional with smaller companies to so incorporate or not; regulate carefully the holding of stock by one corporation engaged in interstate commerce in another competitive corporation, recognizing that intercorporate stockholding is sometimes not only innocent but necessary to sound business conditions by reason of the conflict of State laws. Discrimination should be made, too, in favor of corporations formed for the purpose of carrying on an export business or of dealing exclusively, or practically so, in foreign countries. Those corporations meet with conditions outside of the scope of our legislation, and they should not be hampered in their organization to effectively meet those conditions.

The provision giving conclusive effect to a judgment rendered in a Government suit against an unlawful combination, so as to relieve individuals damaged by its operations from the necessity of proving anew illegality already found to exist after thorough litigation at the suit of the Government, would be an act of justice, if—but only if—the judgment should be conclusive in favor of the defendants, when for them, as well as in favor of persons injured, when rendered in favor of the Government. And, of course, this effect should not apply to a judgment entered by consent, else all voluntary agreements between the Government and corporations or combinations would come to an end because of the danger of such corporations by such agreement exposing themselves to undefined and extensive liability to individuals claiming to be damaged by reason of the unlawful combination.

The best business minds of the country should address themselves to this problem. The time is ripe for effective action. Congress should be left in no doubt as to what the business world regards as safe and sane legislation for its future guidance. The President has paid public tribute to the spirit pervading the business world to-day. He has indicated the lines which to him have seemed those upon which legislation should move. But the controlling motive he has expressed is a desire "to give expression to the best business judgment of America."

If that judgment shall condemn some of the measures proposed in Congress to give it expression, there is no reason to assume that either Congress or the President would fail to heed its voice. But expression and action are imperatively demanded now.

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